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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THEE AGUILA, INC.,

Plaintiff and Appellant,

v.

ARROWHEAD COUNTRY CLUB,
INC.,

Defendant and Respondent.

E069760

(Super.Ct.No. CIVDS1609443)

OPINION

APPEAL from the Superior Court of San Bernardino County. Janet M. Frangie,
Judge. Affirmed.

Owen T. Mascott and Frederick L. Glasser for Plaintiff and Appellant.

Fullerton, Lemann, Schaefer & Dominick, Wilfrid C. Lemann and David P.
Colella for Defendant and Respondent.

Plaintiff and appellant Thee Aguila, Inc. (Aguila) sued defendant and respondent Arrowhead County Club, Inc. (the Club) for (1) breach of contract, and (2) breach of the covenant of good faith and fair dealing. The trial court granted the Club's motion for summary judgment. Aguila contends the trial court erred by granting summary judgment. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. COMPLAINT

On March 24, 2015, Aguila and the Club signed a commercial property purchase agreement and joint escrow instructions, using a California Association of Realtors form. Aguila agreed to purchase the Club's real property in San Bernardino (the property) for \$4,800,000. Also on March 24, 2015, Aguila and the Club signed a business purchase agreement and joint escrow instructions (the business contract), using a California Association of Realtors form. Aguila agreed to purchase the Club's business and inventory for \$200,000.

In Aguila's complaint, it alleged that the business contract included, as a contingency, the sale of the Club's liquor license to Aguila. The Club operates a private club at the property. Aguila intended to operate a public event center at the property. After escrow opened, Aguila learned that it could not use the Club's private liquor license to sell liquor at public events. Aguila decided its intended tenant for the property, Robert Hernandez (Hernandez), would need to purchase a liquor license on the open market.

Hernandez opened escrow on a liquor license. At that point, residents within a certain radius of the property were notified of the possible issuance of a liquor license to Hernandez. “[A] number” of residents opposed the issuance of the liquor license. The liquor license opposition process took longer than Aguila expected.

On April 1, 2016, Hernandez decided he would operate the public event center on the property using a special permit issued by the Department of Alcoholic Beverage Control (the ABC). Hernandez applied for the special permit. While the special permit process was pending with the ABC, Hernandez began soliciting customers. On April 20, Hernandez entered into a contract with Amazon to host Amazon’s annual company picnic. The Amazon picnic was scheduled for May 21 and 22, 2016. Hernandez’s contract with Amazon included a liquidated damages clause of \$1,000,000 that would be triggered if the picnic did not take place at the property. Aguila agreed to indemnify Hernandez for any losses if the Amazon event did not take place at the property.

On May 5, the Club informed Aguila that it would not permit the Amazon picnic to take place at the property. On May 17, the Club served Aguila with a notice to perform, demanding that Aguila close escrow. On May 18, the ABC approved Hernandez’s special permit. The Club was required to return its liquor license to the ABC upon issuance of Hernandez’s special permit, but the Club refused to return its license. The Amazon event did not take place at the property. On May 27, the Club issued cancellation instructions for the business escrow and the property escrow. On June 3, Aguila objected to the escrows being canceled and gave notice of its intent to

proceed with the sales; however, Aguila would not agree to waive the liquor license contingency.

Aguila's first cause of action was for breach of contract. Aguila alleged that a contingency in the property contract and the business contract was that the escrows for the two sales close at the same time. Aguila asserted it performed its obligations under the two contracts. Within the breach of contract cause of action, Aguila repeated facts about the Club not permitting the Amazon event to take place at the property, the Club refusing to return its liquor license to the ABC, the Club issuing a notice to perform the escrow instructions, and the Club issuing cancellation instructions for the two escrows.

Aguila's second cause of action was for breach of the covenant of good faith and fair dealing. Within this cause of action, Aguila repeated the same facts that were set forth in the breach of contract cause of action. Aguila sought (1) specific performance of the contract pertaining to the property sale; (2) \$5,000,000 in general damages; (3) \$5,000,000 in special damages; and (4) attorney's fees.

B. MOTION FOR SUMMARY JUDGMENT

The Club moved for summary judgment. The Club asserted that, in March 2015, Aguila agreed to purchase the property and the business for a total of \$5,000,000 in an all cash transaction. After the liquor license delays, Aguila proposed to modify the purchase contracts. Aguila offered to purchase the property and the business in "as-is" condition, including the unresolved liquor license, if the Club would accept \$2,000,000 in cash and finance the remaining \$3,000,000. The Club accepted Aguila's offer and escrow was scheduled to close in April 2016. In order to close escrow, Aguila needed

to deposit money and have approved insurance. Aguila did not deposit money into the escrow account. Aguila failed to close escrow, and the Club canceled the contracts in May 2016.

The Club asserted Aguila was not entitled to specific performance of the contract pertaining to the property because Aguila admitted it was unwilling to complete the purchase. The Club asserted Aguila was not entitled to damages pertaining to the business contract because the Club did not breach a duty—it was Aguila that failed to perform its duties.

The Club asserted that Aguila and Hernandez did not have authority to schedule events at the property, such as the Amazon picnic. The Club asserted Aguila did not suffer any damages in connection with the Amazon picnic. The Club contended Aguila assigned its interest in the business contract to Hernandez. Therefore, the Club asserted Aguila lacked standing to sue for breach of the business contract. However, the Club also asserted the business contract did not permit an assignment of Aguila's interest without the Club's approval, and the Club did not approve the assignment to Hernandez.

As to the breach of contract cause of action, the Club asserted it was unclear from the complaint exactly what act Aguila was alleging constituted the breach of contract. The Club contended that if the breach was supposed to be the Club's refusal to return its liquor license to the ABC, then the cause of action failed because there was no contractual requirement for the Club to return its liquor license to the ABC prior to the close of escrow. The Club contended that if the breach was supposed to be the Club's issuance of cancellation instructions for the escrows due to the liquor license

issue being unresolved, then the cause of action failed because the escrow instructions were modified to remove the liquor license contingency.

As to the cause of action for breach of the covenant of good faith and fair dealing, the Club asserted the same foregoing arguments applied. The Club contended it cooperated with Aguila throughout the escrow period until Aguila failed to fund the purchase. The Club asserted it was Aguila's unwillingness to fund the two purchases that caused the Amazon picnic to fail.

In the Club's separate statement of undisputed facts, it included the following facts, supported by citations to declarations and a deposition transcript: (1) On March 1, 2016, Aguila offered to modify the business purchase agreement and joint escrow instructions by (a) paying \$2,000,000 in cash, (b) the Club financing the \$3,000,000 balance, (c) Aguila accepting the Club "as-is" with the unresolved liquor license, and (d) the escrow closing within 30 days; (2) on March 18, 2016, the Club's membership approved the modified sale terms; and (3) that same day, the escrow agency was informed of the modification.

The Club provided a copy of the amended March 2016 escrow instructions, which included the following term: "Buyer to take the property in it's [*sic*] current 'as is' condition with unresolved issues with ABC license and water restrictions." The amended escrow instructions were signed by the Club and Aguila.

C. OPPOSITION

Aguila opposed the Club's motion for summary judgment. Aguila asserted that the language of the modified escrow instructions "pre-supposes that a liquor license is

issued.” Aguila asserted it did not “waive[] the condition that the liquor license had to be approved before either of the escrows could close.” Aguila wrote, “ ‘Buyer to take the property in it’s [*sic*] current ‘as is’ condition with unresolved issues with ABC license and water restrictions.’ It is confirming Thee Aguila Inc. is taking the property ‘. . . with ABC license . . .’ If this amendment meant Thee Aguila Inc. was waiving condition [*sic*] that the liquor license be approved, it would say ‘without an ABC license.’ ” (Italics omitted.) Aguila asserted it was not required to deposit money in the escrow account in May 2016 because Hernandez’s liquor license had not yet been approved by the ABC.

D. REPLY

The Club replied to Aguila’s opposition. The Club asserted, “Thee Aguila’s position misconstrues the plain language of the Amendment. The language unequivocally states that Thee Aguila is taking the Club in its ‘current “as is” condition.’ The Club’s then-current condition was with an ABC license that Thee Aguila couldn’t use. [Citation.] The ‘unresolved ABC license issues’ were an explicit reference to the unknown status of the ABC license that Hernandez (*not* Thee Aguila) was pursuing. [Citation.] . . . [¶] The ‘with’ versus ‘without’ argument by Thee Aguila is nonsensical in the context of the Amendment as fully phrased. The ‘with ABC license’ must be read along with the ‘unresolved issues’ and ‘current “as is” condition.’”

The Club explained, “Contrary to [Aguila’s] unsupported conjecture, the parties were well aware that removing the liquor license requirement from the transaction was

the only way to close within thirty (30) days, in time for Thee Aguila to own the Club for the Amazon event.” The Club cited an e-mail from the escrow officer who wrote, on May 25, 2016, “The issuance of the license was not an issue in either Escrow No. 18029 or Escrow No. 18030 having been removed by amendments.” The Club asserted the escrow officer’s e-mail supported the conclusion that “[t]he ABC license was not a condition of closing escrow with [the Club] following the Amendment. Thee Aguila waived this condition.”

E. HEARING

The trial court issued a tentative ruling that reflected, “The motion is granted. There are no triable issues of fact. The condition concerning the issuance of the ABC license was removed from the transaction and escrow failed to close 30 days after approval by [the Club]’s members.”

The trial court held a hearing on the motion. At the hearing Aguila said, “[I]t says, ‘Buyer is to take property in its current as-is condition with unresolved issues from the ABC License and water restrictions.’ [¶] So my question is, to me that presupposes that ABC license has issued.” The trial court responded, “That’s a really strained reading.” The court said, “[I]t appears your client said don’t worry about the ABC License; we’ll close.” The trial court granted the Club’s motion for summary judgment.

DISCUSSION

Aguila contends the trial court erred by granting summary judgment because Aguila did not waive the contingency of receiving a liquor license.¹

“ ‘A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. [Citations.] The moving party bears the burden of showing the court that the plaintiff “has not established, and cannot reasonably expect to establish, a prima facie case” [Citation.]’ [Citation.] ‘[O]nce a moving defendant has “shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,” the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff “may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action” ’

“ ‘On appeal from the granting of a motion for summary judgment, we examine the record de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party.’ ” (*Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 274.)

¹ The Club complains of a variety of alleged errors in Aguila’s appellant’s opening brief, such as a lack of record citations and presenting facts from outside of the record. We note that on February 14, 2019, the attorney who wrote the appellant’s opening brief, Owen T. Mascott, submitted his resignation to the State Bar of California with charges pending (*In re Matter of Mascott* (Answer Dec. 13, 2018) State Bar Court, San Francisco, Case No. 18-O-10561). On April 11, 2019, the State Bar ordered him inactive and ineligible to practice law in California. For the sake of addressing Aguila’s concerns, we will reach the merits of Aguila’s argument.

Aguila does not dispute the Club’s trial court assertion that the escrow instructions were intended to modify the parties’ business contract. Accordingly, we will treat the amended escrow instructions as a contract. (See *Gelber v. Cappeller* (1958) 161 Cal.App.2d 113, 119 [“[t]he escrow instructions as modified constitute a contract between the parties”]; but see *Katemis v. Westerlind* (1953) 120 Cal.App.2d 537, 542 [“Escrow instructions which are merely a customary and conventional means of consummating an underlying executory contract for the sale of real property do not supplant such agreement but merely serve to carry it into effect”].)

“The fundamental rule of contract interpretation is to give effect to the mutual intent of the parties at the time they formed the contract.” (*Cortez Doty Bros. Equipment Co.* (2017) 15 Cal.App.5th 1, 16; see also Civ. Code, § 1636.) “The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.” (Civ. Code, § 1644.)

The language at issue is: “Buyer to take the property in it’s [*sic*] ‘as is’ condition with unresolved issues with ABC license and water restrictions.” A plain meaning of “as is” is “in present form.” It is unclear if “the property” refers to the real property or the business and inventory because the escrow document refers to both sales—the business and the real property.

A plain meaning of “with unresolved issues with ABC license and water restrictions” is “along with the outstanding liquor license problems and water controls.”

In other words, the plain language of the amendment reflects Aguila agreed to complete the purchase without the liquor license problems having been resolved. Accordingly, we conclude the trial court did not err in interpreting the language of the modification.

Aguila contends the trial court erred because the language “ ‘as is’ condition with unresolved ABC license . . . ’ . . . presupposes, as it were, that a liquor license is issued.” Contrary to Aguila’s position, the language “with unresolved issues with ABC license,” indicates there were problems with the liquor license. It is unclear from the language of the modification exactly what problems existed with the license; however, there is no limit to the problems waived. Therefore, the plain language of “with unresolved issues with ABC license” can be understood as Aguila agreeing to proceed with the sale despite any problems with the liquor license.

Aguila goes beyond the meaning of the plain language of the modification and asserts that it would be nonsensical for Aguila to agree to purchase the property and business for \$5,000,000 prior to obtaining a liquor license. There are a number of possible explanations for Aguila’s decision to waive the liquor license contingency:

(1) Aguila wanted Hernandez to host the Amazon event and Aguila believed time was of the essence in closing escrow so it waived the liquor license contingency; or
(2) Aguila no longer had \$5,000,000 in cash, so it needed the \$3,000,000 in financing, and therefore agreed to waive the liquor license contingency in order to obtain financing. We do not know why Aguila waived the liquor license contingency, but the foregoing sample of possible reasons causes us to reject Aguila’s assertion that there

could be no reason for Aguila agreeing to proceed with the sale when the liquor license issues were unresolved.

DISPOSITION

The judgment is affirmed. Respondent, Arrowhead Country Club, Inc., is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

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MILLER
J.

We concur:

RAMIREZ
P. J.

RAPHAEL
J.